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THE STATE OF NEW HAMPSHIRE

THE ATTORNEY GENERAL
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December 16, 1983

Dr. William T. Wallace, M.P.H.
Executive Secretary
New Hampshire Board of Registration in Medicine
Hazen Drive
Concord, New Hampshire 03301

Dear Dr. Wallace:

This is a supplement to the opinion from our office dated September 21, 1983 regarding the propriety and enforceability of Med 404.04 of the Rules of the Board. In our opinion, the practice of hypnotism does fall within the definition of the practice of medicine in New Hampshire statutes. Since Med 404.04 in effect establishes a somewhat different test for hypnotism than that established by the statute, however, the rule should be redrafted to comply with the statute.

RSA 329:1 defines the practice of medicine as follows:

> "Any person shall be regarded as practicing medicine under the meaning of this chapter who shall diagnose, operate on, prescribe for or otherwise treat any human ailment, whether physical or mental."

Any person who uses hypnotism for any of the purposes described in RSA 329:1, or who purports to be able to use it for those purposes, would therefore be practicing medicine as defined in the statute in the absence of an exemption. If that person did not possess a license issued by the Board, he would be in violation of RSA 329:24 and subject to the penalties provided in that statute.

Cases in other jurisdictions support the view that hypnotism constitutes the practice of medicine. In People v. Cantor, 198 Cal.App.2d Supp. 843, 18 Cal.Rptr. 363 (1960), a California appellate court sustained the conviction of a hypnotist for the offense of practicing medicine without a license. California law prohibited a person who was not licensed from practicing, or advertising or holding out as practicing, "any system or mode of treating the sick or afflicted, or diagnosing, treating or prescribing for any ailment, disease, disorder, or other mental or physical condition of any person." 18 Cal.Rptr. at 364. In reaching its decision, the court noted:

> "It is our considered opinion that, in the light of the record in this case, the practice of hypnotism as a curative measure or mode of procedure by one not licensed to practice medicine, amounts to the unlawful practice of medicine. While it may be that one day the use of hypnotism may be recognized sufficiently to warrant the legislature to license that practice, to date it has not done so. To the extent that appellant employed or attempted to practice his hypnotic powers, he was practicing medicine. ..." 18 Cal.Rptr. at 367.

Similarly, in Masters v. State, 341 S.W.2d 938 (Tex. Crim. 1960), the defendant, a practicing hypnotist, had been found guilty of the unlawful practice of medicine. In sustaining the conviction, the appellate court noted that the record indicated the defendant had offered "to treat a physical or mental disorder by a system or method and to effect a cure therefor, and that he charged money for services. ..." 341 S.W.2d at 941. Since this activity fell squarely within the definition of the practice of medicine in the Texas statutes, the court found the evidence sufficient to support the conviction. See also 85 A.L.R.2d 1128 for a further discussion of hypnotism as the illegal practice of medicine.

Although the legislature may choose to separately license hypnotism, as the California court noted, in the absence of any such licensing scheme we are left with no choice but to conclude that hypnotism constitutes the practice of medicine when it is used for any of the purposes described in RSA 329:1. It should also be noted that at least two states, Maine and Massachusetts, have created an exception to the physicians and surgeons licensing requirements for people who practice hypnotism. Me.Rev.Stat. Titl. 66, §8; Mass.Ann.Laws, Ch. 112, §7. New Hampshire statutes, however, have no such explicit exception for hypnotism. See RSA 329:21.

The exact language of Med 404.04 is that "hypnosis (except in cases of theatrical performances) is the practice of medicine. ..." The rule paints with a broader stroke than the statute, since the statute requires that hypnotism be used to diagnose or treat any human ailment in order to be considered the practice of medicine. There could well be exceptions other than theatrical performances where hypnotism would be used for purposes other than that proscribed by the statute. Since the rulemaking authority of an administrative agency allows it to fill in details to effectuate the purpose of a statute, but not to add to, detract from or in any way modify statutory law, Kimball v. New Hampshire Board of Accountancy, 118 N.H. 567 (1978), Med 404.04 should be redrafted to comply with RSA 329:1.

As we noted in our opinion concerning acupuncture, Med 404.04 appears to make the determination of whether hypnotism is the practice of medicine contingent on the rulings of the American Medical Association (AMA) and the Federal Drug Administration (FDA). This aspect of the rule we find to be improper in light of the clear and unequivocal intent of the legislature as evidenced by RSA 329:1. This part of the rule must therefore be modified since a change in the position of the AMA and FDA would have no legal effect on the law of New Hampshire unless the statute was amended. We express no opinion as to whether the Board in the exercise of its rulemaking authority, RSA 329:9, could adopt a rule construing hypnotism to be excepted from the provisions of RSA 329. See RSA 329:21.

Please let us know if you have any further questions.

Sincerely,

Douglas L. Patch
Assistant Attorney General
Division of Legal Counsel

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